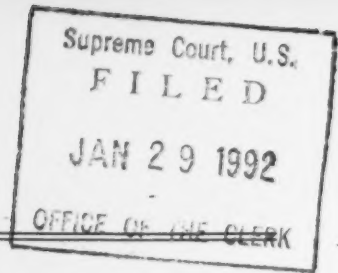


(2)
No. 91-910



In The
Supreme Court of the United States
October Term, 1991

ROBERT SUMMERS and ROBERT NEE,
Petitioners,

v.

WILLIE JOHNSON,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Judicial Court
Of The Commonwealth Of Massachusetts

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the evidence was sufficient to support the determinations by the jury, the Superior Court, and the Supreme Judicial Court of the Commonwealth of Massachusetts that the petitioners, police officers of the City of Boston, who admitted to personal knowledge that the respondent-detainee had suffered severe crippling injuries in the course of his arrest by the two petitioners, denied the respondent medical care in violation of his constitutional rights, when they refused to obtain medical attention for him, transported him to the police station, threw him in the cell upon booking, prepared their paperwork and immediately went off duty without complying with police department regulations which made the petitioners strictly responsible for the safe custody of the respondent-detainee?
- II. Whether the evidence was sufficient to support the determination of the jury, the Superior Court, and the Supreme Judicial Court of the Commonwealth of Massachusetts in finding that the petitioners' denial of adequate medical care in violation of the respondent's constitutional rights proximately caused the respondent's physical and emotional injuries, in accordance with the unchallenged and undisputed standards set by the statutes and case law?
- III. Whether the evidence supported the determination by the Superior Court and the Supreme Judicial Court of the Commonwealth of Massachusetts that the petitioners were not entitled to the defense of qualified immunity where the case law was well established five (5) years prior to the incident giving rise to the instant action that the petitioners had a

QUESTIONS PRESENTED – Continued

constitutional obligation not to violate the respondent's right to receive adequate medical care upon being detained, particularly where the petitioners did not adequately preserve their rights to raise this issue before this Court?

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OPINIONS BELOW

The Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 411 Mass. 82 (1991) and is reproduced as Appendix A to the Petition.

JURISDICTION

The instant action was tried to a jury in the Suffolk Superior Court Department of the Trial Court of the

Commonwealth of Massachusetts, during the week of March 28, 1988. At trial, the petitioners filed the proper motions to adequately preserve their rights to challenge the evidence presented in support of the respondent's legal theories. However, the petitioners failed to file any objections to the jury instructions, or to other rulings of the trial judge, which would have preserved federal questions relating to the legal standards presented to the jury. The petitioners failed to properly preserve their rights to raise the issue of qualified immunity upon appeal. (App. A at 8a).

The petitioners have invoked the jurisdiction of this Court under 28 U.S.C. §2101(c). The trial record reveals that the issues presented to this Court in the Petition for Writ of Certiorari were not raised at the levels of the Trial Court or the Supreme Judicial Court of Massachusetts, and, hence, have been waived.

STATEMENT OF THE CASE

A comparison of the facts, as stated by the Supreme Judicial Court in its Opinion (App. A at 1a), and as stated by the petitioners, shows a significant divergence. This should not occur because, as the Court points out (App. A at 5a):

The standard of review is whether, *viewing the evidence in the light most favorable to the plaintiff*, "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff."

[Emphasis added.]

Instead of following this standard, the petitioners have stated the facts most favorable to them, including those which the jury must have rejected in order to arrive at their verdict. This is a misguided, eleventh-hour attempt to relitigate the facts of the case, rather than arguing the law. The petitioners have embraced this approach because the Supreme Judicial Court neither misstated nor misapplied any settled federal law. The Court merely decided, under Massachusetts law, that the jury had before them sufficient facts to support their verdict.

On the night of July 20, 1981, the respondent, Willie L. Johnson, a 33 year old black man with no prior criminal record, was arrested because of a minor disturbance at the apartment of his girlfriend (Earline Guins), by petitioners Summers and Nee, officers of the Boston Police Department. In their "aggregate of more than thirty years of law enforcement experience," the petitioners had each previously accumulated a significant number of complaints for brutality and other official misconduct.

During the evening, Mr. Johnson left the apartment briefly to roll up his car windows when it started to rain, leaving behind his wallet. Upon returning, he found the door locked and Ms. Guins unresponsive to his repeated knocking. There had been no altercation between them that night, but Ms. Guins had decided to go to sleep because she had to get up for work early the following day, and did not bother to inform Mr. Johnson of her intentions. Ms. Guins' door had previously been damaged by two burglaries, after each of which Mr. Johnson had repaired the frame. When there was no response to

his repeated knocking, Mr. Johnson opened the door by pushing on a weak spot in the frame. Ms. Guins was enraged and called the police, who did not respond until several calls had been placed. In the meantime, Mr. Johnson obtained a hammer and nails from the apartment and started fixing the door frame.

The petitioners arrived at the apartment sometime later, responding to a reported breaking and entering in progress. Upon their arrival they saw "just a guy fixing the door". Mr. Johnson directed the petitioners to Ms. Guins, who lead them into her apartment to explain the situation.

After a brief discussion, petitioner Summers told Mr. Johnson to leave, having made the determination that the problem was just a "lovers quarrel" and that there was no need for police intervention. Mr. Johnson said that he wanted to fix the door before leaving. Petitioner Summers ordered Mr. Johnson to leave. Mr. Johnson again indicated that he wanted to fix the door first. The petitioner struck Mr. Johnson, spun him around, slammed him against the wall, and handcuffed him behind his back. Although petitioner Summers later "justified" the arrest on the basis of Ms. Guins' allegation that Mr. Johnson had earlier tried to rape her, petitioner Summers testified that he did not believe the allegation, and Mr. Johnson was not so charged by the arresting officers.

With Mr. Johnson handcuffed and off balance on the landing of the steep staircase, petitioner Summers either shoved Mr. Johnson or, according to his own testimony, released his grip on the handcuffs, causing Mr. Johnson to fall the entire length of the staircase, ten to fifteen steps.

The fall shattered Mr. Johnson's right tibia into fragments. As Mr. Johnson lay at the bottom of the staircase, one of the petitioners approached and struck Mr. Johnson in his knee, with a long, hard object, presumably his nightstick or flashlight. Both petitioners witnessed Mr. Johnson's precipitous fall down the staircase. Mr. Johnson complained to the petitioners that they "broke [his] leg". Both petitioners testified that Mr. Johnson began complaining bitterly about the injury to his knee, from this point until he was thrown into the cell by them.

As Mr. Johnson lay at the bottom of the interior staircase, the petitioners grabbed him under his arms, dragged him out of the building and onto the porch. They either kicked him or again permitted him to fall down the exterior staircase, landing on his knee, face and shoulder on the sidewalk. Neither of the petitioners fell, despite their contention that the stairs were slippery. Both the jury and the appellate Court had before them photographs of the two stairways, showing the number of steps and their steepness.

The petitioners then grabbed Mr. Johnson under his arms and dragged him from the porch to the cruiser and threw him in. They testified that they knew he was too severely injured to walk the short distance.

The incident occurred half an hour before the petitioners' tour of duty was scheduled to end. Despite his requests to take him to a doctor because of his pain, Mr. Johnson was taken by the petitioners to the Area C Police Station, rather than a nearby hospital. Petitioners testified that police procedure permitted them to do the latter, but if they had done so, they would have had to stand by at

the hospital until relieved by a superior, which would have been later than their 1:00 a.m. quitting time.

At the station house, the petitioners again dragged Mr. Johnson from the cruiser to the cell, despite his begging to be permitted to crawl to avoid the pain of being dragged. There, Mr. Johnson was booked, the petitioners completed their paperwork, and they left the station. The booking sheet states that he was arrested at 12:40 a.m., and booked at 12:57 a.m.

Mr. Johnson howled in pain in his cell until a black police officer investigated and had him taken to Boston City Hospital. While in the cell, Mr. Johnson poured water from the cell toilet on his broken leg to ease the pain.

According to emergency room records, Mr. Johnson arrived at Boston City Hospital at 3:18 a.m. X-rays taken at the hospital revealed that his tibia had been shattered into approximately 6 pieces. One bone fragment had severed his popliteal artery, the major artery supplying blood to his lower leg and foot. His patella was also fractured. Emergency procedures were commenced immediately to repair the vascular damage. Following an unsuccessful attempt to transplant a blood vessel, an artificial graft was employed successfully.

Due to the length of time that the blood supply to Mr. Johnson's leg and foot had been cut off, surgeons could undertake no repairs to the shattered bones of his knee and leg. The medical records introduced into evidence repeatedly indicate the length of time that had elapsed since the injury and blamed the delay for the inability to

perform necessary orthopedic repairs. Surgical complications and infections further delayed orthopedic repairs until repair was no longer possible. The doctors then fused the shattered bone shards in Mr. Johnson's right knee, resulting in his permanent inability to bend his right leg. Mr. Johnson's right leg remains permanently fixed in a 10 degree angle. It is approximately 3 inches shorter than his left leg, which will cause further injury to his hip, leg, back and ankle in the future. The artificial artery used to restore blood flow to his lower leg is susceptible to blood clotting (deep venous thrombosis). Mr. Johnson has sustained emotional injuries as well, as to which there was additional expert testimony.

Dr. Brian J. Awbrey, an orthopedic surgeon at Massachusetts General Hospital, testified that eight hours is about the limit of time that an extremity can remain without blood. He also stated that although Mr. Johnson's operation was started at 7:15 a.m., it would probably have been an hour or longer into the operation before blood flow was restored. Thus, Mr. Johnson was at the outer limits of the time to prevent loss of his leg when the surgery was performed.

Although he lived only a short distance from both the police station and the courthouse, no action was taken to bring Mr. Johnson before the Court, on the charge for which he was arrested, for over a year after the incident. Only after written notice of intent to pursue a claim (required under Massachusetts law) was filed with the Mayor and the Police Commissioner, did petitioner Summers press the prosecution of Mr. Johnson for breaking and entering. Mr. Johnson was convicted in the Dorchester Division, District Court Department of the Trial Court

(a local Police Court where petitioners appear frequently) and sentenced to probation. The conviction was reversed on appeal.

At the trial of this action, after three days of deliberation, the jury found for the petitioners on Mr. Johnson's claims of police brutality under federal and state statutes, but found for Mr. Johnson on his claims that the petitioners had violated his constitutional rights by improperly delaying or failing to provide him necessary medical assistance while in custody. The petitioners did not object to any of the jury instructions, including those addressing the plaintiff's cause of action, and the evidence necessary to establish liability and proximate cause. The petitioners filed a motion for Judgment Notwithstanding the Verdict, and challenged the sufficiency of the evidence to support the claims against them on appeal. That was the focus of the determination of the Massachusetts Supreme Judicial Court which took the appeal from the Massachusetts Appeals Court, *sua sponte*, and affirmed the verdict for Mr. Johnson. The Court was divided on the sufficiency of the evidence of proximate cause, but was otherwise in agreement as to the sufficiency of the evidence of liability and qualified immunity.

REASONS FOR DENYING THE WRIT

- I. Whether the evidence was sufficient to support the determinations by the jury, the Superior Court, and the Supreme Judicial Court of the Commonwealth of Massachusetts that the petitioners, police officers of the City of Boston, who admitted to personal knowledge that the respondent-detainee had suffered severe crippling injuries in the course of his arrest by the two petitioners, denied the respondent medical care in violation of his constitutional rights, when they refused to obtain medical attention for him, transported him to the police station, threw him in the cell upon booking, prepared their paperwork and immediately went off duty without complying with police department regulations which made the petitioners strictly responsible for the safe custody of the respondent-detainee?

The petitioners have improperly attempted to raise issues in this Court which they have not raised below. The petitioners did not challenge the jury instructions or the Trial Court's determination as to the elements necessary for the petitioner to establish the liability action. The Supreme Judicial Court established no different standards. The only issue before that Court, and properly before this Court, is whether the evidence presented to the jury was sufficient to establish that the petitioners violated Mr. Johnson's constitutional rights by denying him adequate medical attention.

The petitioners have attempted in the petition to recharacterize the evidence presented at trial in an effort to appear to challenge the legal basis of the verdict, when in fact, they never raised any such issues below. The decision of the Massachusetts Supreme Judicial Court is

entirely consistent with the legal principles enunciated in cases cited by the petitioners, starting with this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), through the lower Court decisions cited by the petitioners. The jury rejected the petitioners' arguments. The Superior Court upheld the jury determination. The Supreme Judicial Court of Massachusetts affirmed the Superior Court determination. Neither federal nor constitutional law will be advanced by having this Court again review such determinations.

Despite the petitioners' efforts to portray this case as one in which the petitioners negligently failed to assess accurately a latent physical ailment of unknown severity, the testimony of these petitioners, (as well as of the respondent, Mr. Johnson), makes it clear that the petitioners witnessed and knew of the respondent's injuries, the severity of those injuries and the need for prompt medical care of Mr. Johnson but, despite such knowledge and repeated pleas for prompt medical attention, the petitioners did nothing to assist him. (App. A at 6A-7A, n. 5). Indeed, the testimony relied upon so heavily by the petitioners in their alternative version of the facts was provided by a single witness, Peter Woloschuk, an alleged civilian "ride-along" in the petitioners' cruiser at the time of the incident, who was not identified until shortly before the trial of this action. He alone, *contrary to the testimony of the petitioners*, contended that Mr. Johnson caused his own injuries by repeated attempts to escape the two burly petitioners, despite being handcuffed behind his back, and being held by the officers. Mr.

Woloschuk's testimony is suspect for a number of reasons, not the least of which is that he is either a personal friend of respondent Summers (his testimony) or a police sycophant (inference from Summers' testimony). His testimony is not only inherently improbable, but according to the plaintiff's orthopedic expert witness, Dr. Brian J. Awbrey of the Massachusetts General Hospital, it is not medically possible for Mr. Johnson's injuries to have been caused by the sequence of events as described by Mr. Woloschuk.

The petitioners also argue that Boston Police Department Rule 318 relieves them from liability. The jury had before them the entire Rule, including section 5 which holds the police officer strictly responsible for the safe custody of prisoners under his care, and indicates that the responsibility remains with him at all times. Even Section 1, upon which the petitioners rely for a mandate to proceed immediately to the station with an injured prisoner, starts with the words "Except when otherwise ordered or allowed. . . ." The jury heard testimony from petitioner Summers that alternate procedures existed on the night of this arrest which gave officers the discretion to take an injured detainee to a hospital rather than to a police station, in order to have him properly evaluated by medical care providers prior to booking. The petitioner testified that while the severity of the injury was a factor which would determine whether a prisoner would be taken to the station or to the hospital, he knew that Mr. Johnson could not walk, he did not look at him, showed no concern for his injury, and made no effort to determine the seriousness of his injuries at all. Indeed, in his direct testimony, petitioner Summers testified that he personally

believed that Mr. Johnson was "internally bleeding", after he was removed from the building by the petitioners.

II. Whether the evidence was sufficient to support the determination of the jury, the Superior Court, and the Supreme Judicial Court of the Commonwealth of Massachusetts in finding that the petitioners' denial of adequate medical care in violation of the respondent's constitutional rights proximately caused the respondent's physical and emotional injuries, in accordance with the unchallenged and undisputed standards set by the statutes and case law?

The petitioners did not challenge the jury instructions on the issue of proximate cause. There was no question presented by either party at the trial or appeal of this action which in any way questioned the established standards of proving proximate cause in civil rights actions for the denial of medical assistance. The petitioners' effort to raise that as a novel question of law is disingenuous. The dissent to the opinion of the Massachusetts Supreme Judicial Court did not challenge the legal standards necessary to establish proximate cause. The only question on which the Court was divided was whether the proof presented at trial was sufficient to meet the undisputed standard.

At trial, the question of proximate cause was addressed by two expert witnesses, Brian J. Awbrey, M.D., an orthopedic surgeon, and Larry H. Strasburger, M.D., a psychiatrist, as well as Mr. Johnson's medical records from the Boston City Hospital reflecting care and treatment over a period of several months.

In addition, both the jury and the appellate Court had several photographs showing the stairs and the condition of Mr. Johnson's legs. From this evidence the jury could reasonably infer that Mr. Johnson's initial injury to his right leg occurred because of a fall from the top of a steep set of stairs. Any reasonable person witnessing a fall under those conditions would immediately recognize the likelihood of serious injury. A second fall down five steps, even if it occurred as petitioners' witness Woloschuk suggested, with Mr. Johnson jumping off the porch, his hands cuffed behind his back, and landing on his knees, would have to be perceived by any observer as causing, or aggravating, a serious injury.

The failure of the petitioners to take any action regarding this injury resulted, as it typically does, in other officers ignoring Mr. Johnson's complaints because the arresting officers ignored them. Thus, by the time action was taken, and the hospital was able to address Mr. Johnson's medical problems, so much time had passed that only one medical option was available, and that was to save his leg.

In this factual framework, all of the time becomes critical, and the petitioners' total indifference to Mr. Johnson's medical condition, because they didn't want to get stuck at the hospital at the end of their shift, was causally related to the ultimate injury which he received.

But it is not the function of the highest Court in the land to read the handwritten notes of nurses, doctors and therapists to attempt to determine whether there is sufficient evidence to establish an undisputed legal standard. The petitioners were unsuccessful in their arguments at

the trial and appellate level, and should not have a right to an appeal on issues which will be of absolutely no consequence to any other party in any other action in the country. As the standard of proof is unquestioned, the specific medical record references in Willie Johnson's case can have no impact on United States constitutional law.

III. Whether the evidence supported the determination by the Superior Court and the Supreme Judicial Court of the Commonwealth of Massachusetts that the petitioners were not entitled to the defense of qualified immunity where the case law was well established five (5) years prior to the incident giving rise to the instant action that the petitioners had a constitutional obligation not to violate the respondent's right to receive adequate medical care upon being detained, particularly where the petitioners did not adequately preserve their rights to raise this issue before this Court?

The Supreme Judicial Court of Massachusetts indicated that the issue of qualified immunity was not properly raised at trial or preserved for appeal. (App. A at 8a). The Court reviewed the question only because the issue made no difference to its result. In doing so, the Court did not change any of the applicable standards or interpretations of rulings of this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Even if the issue were properly preserved for appeal, the determination of this Court in *Estelle v. Gamble*, five years before the arrest of Mr. Johnson (which decision was based on a long line of federal case law at the district and circuit court levels), established that there was no

basis for the petitioners' claims to qualified immunity. The law was well established that persons in the position of the petitioners had a legal obligation to provide adequate medical care for injured detainees in their custody. The petitioners knew or should have known of this constitutional standard. As the petitioners were well aware of Mr. Johnson's physical injuries, having at least witnessed, if not caused them, they were obliged to comply with the dictates of this Court and the law and provide adequate medical care for Mr. Johnson. The law having been well established for a decade or more, there is no basis for this Court to grant the writ on this issue.

CONCLUSION

For all of the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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